IN THE

Supreme Court of the United States

OCTOBER TERM 1960

No. [illegible]

CITIZENS UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Citizens Utilities Company, respectfully prays that a Writ of Certiorari issue to review the Decree of the United States Court of Appeals for the Second Circuit entered in this case on June 7, 1960.

CITATIONS TO OPINIONS BELOW

The Decision of the Chief Presiding Examiner of Respondent Federal Power Commission (R. 1572-1624),[1] is unreported. The Opinion and Order of Respondent Federal Power Commission (R. 1738-1755), is reported at 21 FPC 233.[2] The Opinion of the Court of Appeals for the the Second Circuit is reported at 279 F. 2d 1 and is printed in Appendix B hereto, *infra*, pp. 3a-7a.

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[1] In accordance with the Order of the Court of Appeals dated July 22, 1959, page references are to the pagination of the Record as certified by Respondent to the Court of Appeals.

[2] In view of the filing in this Court of nine copies of the Joint Appendix in the Court of Appeals, the Decision of the Chief Presiding Examiner and the Opinion and Order of Respondent are not reproduced in the Appendices to this Petition.

JURISDICTION

The Decree of the Court of Appeals was entered on June 7, 1960 (Appendix B, *infra*, p. 8a). Petitioner's timely Petition for Rehearing was filed on June 8, 1960 (R. p. 644), and denied on June 13, 1960 (R. pp. 656-657). The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Under Section 23(b) of the Federal Power Act, does Commission jurisdiction attach to dams located on reaches of a stream which are not navigable waters of the United States, where the Court fails to find and the record fails to show that any part of the stream is "used or suitable for use for the transportation of persons or property in interstate or foreign commerce?"

2. Does the Federal Power Commission automatically have jurisdiction over dams located on non-navigable reaches of a stream, on the sole ground that such dams, inevitably delaying the passage of water to downstream navigable waters of the United States, necessarily have the "effect" upon the interests of interstate or foreign commerce required by Section 23(b) of the Federal Power Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 3(8) and 23(b) of the Federal Power Act, Title 16 U. S. C. §§ 796(8) and 817. They are set out in Appendix A, *infra*, pp. 1a to 2a.

STATEMENT

Petitioner owns and operates a small electric utility in northern Vermont. Its facilities include certain dams and appurtenant power stations located on and adjacent to the Clyde River.

Clyde River is 27 miles long. It lies wholly within the State of Vermont. The Clyde empties into Lake Memphremagog in the City of Newport, Vermont (R. 1201, 1202, 1214 *et seq.*, 1284 *et seq.*). The Lake lies partly in the United States and partly in Canada (R. 1583, 1742).

It is conceded that the Clyde, and Petitioner's facilities thereon, had, and can have, no effect, physical or otherwise, on Lake Memphremagog (R. 1040-1052, 1409 *et seq.*).

The Clyde is the smallest, most insignificant stream over which Respondent has ever attempted to assert its jurisdiction. Its physical characteristics are singular. The Clyde's profile shows a total fall of 490 feet from its source to its mouth, an average of approximately 19 feet per mile. In the 11¾ mile section closest to the mouth of the stream there is a fall of 460 feet, an average of approximately 40 feet per mile. Between the end of the second mile of the stream and its mouth, there is an aggregate fall of 196 feet, an average of 98 feet per mile (R. 356 *et seq.*, 862, 1284 *et seq.*, 1372, 1586).

Petitioner's Unit No. 11, a small generating facility operated in conjunction with an upstream diversion dam, is located one mile from the mouth of the Clyde. Generating Units 1, 2 and 3 are located one and one-half miles upstream from the mouth of the Clyde (R. 1387 *et seq.*, 1472 *et seq.*). Petitioner's Clyde Pond Dam is located at the outlet of Clyde Pond, two miles upstream from the mouth of the stream (R. 1290).

On the eleventh mile of the stream Petitioner owns and operates another small dam and power station. On a tribu-

tary in mile 20 of the stream. Petitioner operates two dams at the mouths of two ponds.

The first 4800 feet of the stream from its mouth are at the water level of Lake Memphremagog (R. 631, 792, 789, 807, 1047-1049, 1079; 1824 *et seq.*). It is conceded that the level of the Lake is controlled by factors wholly extraneous to the Clyde and Petitioner's facilities thereon (R. 1040-1052, 1409 *et seq.*).

On November 30, 1956 (R. 1472 *et seq.*) Petitioner filed a Declaration of Intention with Respondent relating to its Unit No. 11. On June 24, 1957 (R. 1493 *et seq.*) Respondent instituted an investigation to determine whether it was in the public interest to issue an order to conserve and utilize the navigation and water resources of the Clyde River region. Respondent also directed a hearing on the Declaration of Intention.

Respondent's Order of June 24, 1957 recognized the need for proof on the issue of "commerce," i.e., that the Clyde was "used or suitable for use for the transportation of persons or property in interstate or foreign commerce." It recited the results of Respondent's preliminary investigation and stated that the Clyde (a) "* * * has been used for commerce, principally for the floating of forest products * * *," and (b) "* * * together with Lake Memphremagog in their natural condition, or with minor improvements, would be capable of transportation of persons and property in interstate or foreign commerce." The Order also noted a prior Commission proceeding (wherein Petitioner was not a party) which had referred to the alleged fact that in Colonial times the Clyde, together with certain other bodies of water, served as a "highway" for Indians between points in the New England colonies and points along the St. Lawrence River.

These three preliminary findings were each predicated on an assertion of use or suitability for use of the Clyde

for the transportation of persons or property to interstate or foreign commerce. In short, the cornerstone of Respondent's claim of jurisdiction was an assertion of the "navigability" of the stream under Section 3(8) of the Federal Power Act, Title 16 U. S. C. § 796(8). Nowhere in the June, 1957, Order was it even suggested that Respondent's jurisdiction attached or could attach on the theory that Petitioner's facilities, if not located in or on "navigable waters of the United States," would affect the interests of interstate or foreign commerce under Section 23(b) of the Federal Power Act, Title 16 U. S. C. § 817.

Hearings were held before Respondent's Chief Presiding Examiner. Based upon an "imposing and voluminous record" (R. 1753), the Chief Presiding Examiner wrote a lengthy Decision (R. 1572-1624) in which he concluded that the Clyde, in its entirety, was not "navigable waters of the United States"; that approximately only the first 4800 feet of the 27-mile stream were such "navigable waters"; that none of Petitioner's facilities were located in that 4800 foot reach of the stream; but nevertheless, that the operation of certain of Petitioner's facilities on upstream "non-navigable" reaches of the stream would affect the interests of interstate or foreign commerce in the "navigable" 4800 foot reach of the stream.

The Chief Presiding Examiner's Decision considered, appraised and rejected each of the three jurisdictional findings of "commerce" contained in Respondent's Order of June, 1957. He said (R. 1608):

> "No case which has come before this Commission * * *, no proceedings before federal courts have been cited in which the volume of commerce shown by proof was so small as that shown here."

Petitioner and Respondent filed exceptions to the Chief Presiding Examiner's Decision (R. 1644 *et seq.*, 1679 *et seq.*). Respondent Commission, by Opinion and

Order dated February 16, 1959, reversed the Presiding Examiner (R. 1739 *et seq.*). It held the entire Clyde River to be "navigable waters of the United States." It also held that even if the entire Clyde River was not such "navigable waters", the first 4800 feet thereof were, and the operation of Petitioner's upstream facilities affected the interests of interstate or foreign commerce in the first 4800 feet (R. 1739 *et seq.*).

Three of the five Commissioners joined in Respondent's Opinion. One Commissioner concurred in result only, his separate Opinion clearly indicating his dissent from the Commission's holding that the entire Clyde was "navigable waters of the United States." The fifth Commissioner did not participate (R. 1752 *et seq.*).

Respondent ordered Petitioner to file application for license (R. 1752). Respondent denied Petitioner's timely application for rehearing (R. 1756 *et seq.*, 1787 *et seq.*). Petitioner's compliance with the licensing direction of Respondent's Order was deferred pending completion of all review proceedings (R. 1787 *et seq.*).

Petitioner timely filed a Petition for Review in the United States Court of Appeals for the Second Circuit.

On May 24, 1960 the Court of Appeals made a Decision (Appendix B, *infra*, pp. 3a-7a) wherein it expressly declined to decide whether Respondent was correct in holding that the entire Clyde River was "navigable waters of the United States." Instead, assuming "navigability" of only the first 4800 feet of the stream, and without deciding whether any evidence supported a finding that such 4800 feet was "used or suitable for use for the transportation of persons or property in interstate or foreign commerce," the Court entered a limited affirmance of Respondent's Order. It held that the operation of Petitioner's dams came within Section 23(b) of the Act as affecting the interests of interstate or foreign commerce in the first 4800 feet of the stream.

The Court below specifically did not find that Petitioner's facilities "would" affect the interests of interstate or foreign commerce. Instead, the Court stated (Appendix B, *infra*, p. 6a):

> "It cannot be said that the 'effect' of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817; that is to say, that 'the interests of interstate or foreign commerce would' (not) 'be affected by the construction of a dam' of the kind here at issue."

The Court concluded that so long as *any* physical change could occur in navigable waters of the United States, caused by upstream operations in non-navigable waters of the United States (Appendix B, *infra*, p. 7a),

> "It is not necessary for us to measure how much variation will justify actual intervention by the Commission."
>
> "* * * it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of petitioner, are capable of 'affecting' temporarily the flow of water in the river below Unit 11. * * *"

The Court made no determination whether the "effect", whose finding it affirmed, was substantial or unsubstantial, adverse or beneficial.[1]

REASONS FOR GRANTING THE WRIT

1. Section 3(8) of the Federal Power Act, Title 16 U. S. C. § 796 (8) (Appendix A, *infra*, p. 1), defines navigable waters of the United States as

> "those parts of streams * * * over which Congress has jurisdiction under its authority to regulate com-

[1] Indeed, the places where the Court below purported to localize the "effect" of Petitioner's dams were in every instance *upstream* of the 4800 foot section it presumed to be "navigable" (Joint Appendix, pp. 648-651).

> merce with foreign nations and among the several States, and which * * * are used or suitable for use for the transportation of persons or property in interstate or foreign commerce * * *."

Section 23(b) of the Federal Power Act, Title 16 U. S. C. § 817 (Appendix A, *infra*, p. 1), provides that where projects are to be constructed in waters other than those defined as navigable waters of the United States, Respondent shall investigate such proposed construction

> "* * * and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction * * *"

such construction shall not proceed until a license has been applied for and issued by Respondent. If Respondent does not find such an effect, permission is granted for the construction of such project works in compliance with State law.

Whether Respondent's licensing jurisdiction be asserted under Section 3(8) or under Section 23(b) of the Federal Power Act, Congress' power, and Respondent's licensing power in turn, are founded upon the Commerce Clause of the Constitution. United States Const., Art. I, § 8, Cl. 3. The project works must either be located in or on navigable waters of the United States or, if located on waters which are not navigable waters of the United States, must affect the interests of interstate or foreign commerce in other navigable waters of the United States. In either event, the "commerce" cornerstone of jurisdiction must be satisfied. This Court, and other Courts, have consistently so held. *Leovy* v. *United States*, 177 U. S. 601, 632-634 (1900); *The Daniel Ball*, 77 U. S. 557, 563 (1871); *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, 404 (1940); *Oklahoma* v. *Texas*, 258 U. S. 574, 591 (1922); *Gulf & I. Ry. Co. of Texas* v. *Davis*, 26 F. 2d 930,

933 (D. C. Texas, 1928); *Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852, 896 (C. Cl. 1949), cert. den. 339 U. S. 982 (1950); *United States* v. *Cavalliotis*, 105 F. Supp. 742 (D. C. N. Y. 1952).

The Decision below permits jurisdiction under Section 23(b) of the Federal Power Act to be established on the "effect" theory without the basic finding that the waters in which the interests of interstate or foreign commerce are assertedly affected are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. This is in direct conflict with the cited prior decisions.

The Court below appears to hold that by affirming Respondent's jurisdiction only under the "effect" theory of Section 23(b), and by assuming "navigability" of only the first 4800 feet of the stream, it thereby avoids the need to resolve the cardinal issue of "commerce." However, the evidence adduced by Respondent's Staff in support of its attempt to satisfy the "commerce" requirement was not peculiar to the first 4800 feet of the Clyde. All of the evidence on the "commerce" issue was general to the stream, in its entirety. Since the Court below did not hold that such evidence was sufficient to satisfy the "commerce" requirement, and hence to impose "navigability", on the stream in its entirety, there was and is no basis for a holding that it was sufficient to impose "navigability" on the first 4800 feet of the stream as a separate unit.

Since the Court of Appeal's affirmance must ultimately rest, as a matter of Constitutional necessity, upon a predicate of "commerce," it gives implicit sanction to the findings made by Respondent on this subject. Yet each of the factors upon which Respondent relied is either in conflict with prior decisions of this Court or other Courts of Appeal or poses a novel question.

Respondent relied upon four matters to establish "commerce" in support of its conclusion that the Clyde was "navigable waters of the United States.".

(a) Local Pleasure Boating

The first of these was based on evidence of wholly intrastate pleasure boating on portions of the stream. This, Respondent speculated, "could be continued into Canada" on Lake Memphremagog (R. 1745, 1748).

Even if we assume, *arguendo*, that the record contained substantial evidence of such intrastate pleasure boating on the Clyde, that evidence cannot satisfy the requirements for a showing of "commerce." *United States* v. *The Montello*, 87 U. S. 430 (1874); *Harrison* v. *Fite*, 148 Fed. 781, 783 (C. A. 8 1906); *United States* v. *Ross*, 74 F. Supp. 6, 9 (D. C. Mo. 1947). Respondent's reliance upon such intrastate pleasure boating to show "commerce," and the affirmance by the Court below, pose a direct conflict with the cited decisions

Furthermore, the Court of Appeals' implicit approval of Respondent's speculation that such pleasure boating "could be continued" in foreign commerce is also at odds with decisions of this and other Courts. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 229-230 (1938); *Gulf Refining Co.* v. *Mark C. Walker & Son Co.*, 124 F. 2d 420, 425-426 (C. A. 6 1942); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 867 (C. A. 2 1938); *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. 2d 985, 989 (C. A. 4 1938).[1]

[1]Respondent's Commissioner Kline put his finger on this error. He said (R. 1753):

> "The majority, despite the lack of substantial supporting evidence in the record, has chosen to draw inference after inference as to commercial uses which 'could be'; 'could have'

b. Indian Use

The second basis of Respondent's finding of "commerce" rests upon alleged use of the stream as an Indian travel route between Canada and the colonies in Colonial times (R. 1748). However, even Respondent recognized the inadequacy of alleged Indian use of a stream to sustain a finding of "commerce" when, without benefit of evidence, it proceeded from that finding to speculate that such Indian use made the stream "suitable for use by fur traders and trappers" (R. 1748). There was not one word of evidence in the record to suggest the existence at any time of fur traders and trappers in the area.

Aside from the fact that the record clearly shows, as indeed the Chief Presiding Examiner found (R. 1612), that the only evidence of Indian use of the stream was based upon one journey, from which it could not even be determined whether the Indians had used the stream as a means of water conveyance (R. 718 *et seq.*), there has never been a case in which either Respondent or any Court has grounded a finding of "commerce" upon such insignificant, indeed ephemeral, evidence.

If Respondent's jurisdiction truly extends to every stream in this Country along or over which Indians may have travelled in Colonial times, for whatever purpose, then the importance of such a holding is equalled only by its novelty and should be decided authoritatively by this Court.

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or 'probably' existed on the stream * * *. Similarly, the smallest pleasure boats 'could be' commercial carriers to the lake * * *.

"The Examiner pointed out, among other things, that no witness had ever observed any commercial boating or commercial use of the river other than the floating of logs, despite the fact that many witnesses had lived in the immediate area and had observed the river for 70 to 80 years; * * *".

c. Log and Pulp Wood Transportation

The main body of evidence upon which Respondent's Staff relied for its showing of "commerce" stemmed from evidence of the transportation of logs and pulp wood on the stream (R. 1748). There is no doubt that under the cases, transportation of forest products may, under certain specific circumstances, suffice to support a finding of use or suitability for use of a stream for transportation of persons or property in interstate or foreign commerce. *Wisconsin Public Service Corp.* v. *Federal Power Commission*, 147 F. 2d 743 (C. A. 7 1945), cert. den. 325 U. S. 880; *State of Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334 (C. A. 7 1954); *Wisconsin-Michigan Power Co.*, 3 FPC 449. See also, *Namekagon Hydro-Electric Co.* v. *Federal Power Commission*, 216 F. 2d 509 (C. A. 7 1954). However, each of these cases has required specifically that the evidence show that the transportation of logs or pulp wood be in the course of a continuous interstate or foreign journey by water on the stream.

Here the Commission found (R. 1746):

> "There is no direct evidence in the record that the logs floated down the Clyde River or brought up the Clyde from the Lake were sold outside the State of Vermont, but, of course, there is no reason why they could not have been sold in other states or Canada."

The Commission also found (R. 1748):

> "While the record does not show that the particular logs cut along the Clyde and floated down it were transported as such or in the form of lumber or pulp to other states or to Canada, this probably occurred * * *."

The fact is, as Respondent's own Decision concedes, that this record does not demonstrate any transportation of

logs or pulp wood by floatation on waters in interstate or foreign commerce (R. 1608-1610). Respondent's reliance on this evidence for a showing of "commerce", and the affirmance by the Court below, is a departure from accepted standards and creates a plain conflict between that holding and the decisions which have been cited.[1] This conflict is important, for if local, intrastate log or pulp wood transportation on water is alone sufficient to create Federal Power Commission jurisdiction, then the area of such jurisdiction is infinitely extended beyond that which has previously been defined. Such extension presents a novel and important question for this Court.

d. Improvability of the Stream

The Court below made its only reference to "commerce" when it said (Appendix B, *infra*, p. 6a):

> "It must always be remembered that in constructing subchapter I of chapter XII of Title 16, United States Code, we are to take into consideration, not alone the condition of the stream as it is, but that 'it is proper to consider the feasability of interstate use after reasonable improvements which might be made.'"

Petitioner's position does not in any way involve a re-argument of this Court's decision in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377 (1940). Had there been any evidence in the record to show that by dint of improvements which might have been made to any portion of this stream at a cost reasonable in relation to the commerce to be served (311 U. S. 377, at p. 408), the

[1] To overcome this plain conflict, Respondent actually went as far as to urge in the Court below that interstate floatation of logs, followed by possible (undisclosed in this record) shipment of finished products out of the State by means of transport other than water, was sufficient.

Clyde could be made into navigable waters of the United States, we would have no more to say on this "commerce" point.

However, we flatly state that Respondent's Staff introduced no evidence to show the improvability of any portion of the stream, or the feasability of use of any portion of the stream for interstate or foreign commerce after improvement. Significantly, the Court, aside from its paraphrase of what is undoubtedly good law, referred to no such evidence. Indeed, the only evidence on this subject was introduced by Petitioner. A report (R. 1456-1459) prepared by the New York District Corps of Engineers, United States Army, in September, 1954, stated that the streams draining into Lake Memphremagog, specifically including the Clyde, are "not navigable" and "there is no likelihood of * * * establishment of commercial navigation on the lake."

In fact, more than 125 years ago a report (R. 1376-1378) of a survey contained a proposal to improve the travel route between the Connecticut River and Lake Memphremagog. That report recognized the utter impossibility of improvement to the Clyde when it proposed that in place of the Clyde River a completely man-made, artificial canal be built parallel to the stream for its entire length except for the first mile from its mouth and some of the ponds.

In sum, the Court of Appeals was required under clearly established case law to pass upon and decide whether "commerce" had been satisfactorily shown by the evidence. It did not do so. Nevertheless its affirmance implicitly approves the findings on that subject made by Respondent. Those findings, we submit, are in conflict with the decisions of this and other Courts and should be reviewed.

2. The Court below holds that all dams located on non-navigable waters of the United States, or on non-navigable tributaries of such waters, are within Federal Power Commission jurisdiction irrespective of the kind of "effect" which such dams have upon the interests of interstate or foreign commerce in downstream navigable waters of the United States. The Court below says it will not measure or appraise the "effect" which has been found. *Any* effect suffices to create jurisdiction under Section 23(b) of the Federal Power Act. Appendix B, *infra*, p. 7a.

The erection and operation of a dam in any body of water necessarily has the result that to the extent of its impounding capacity the time when the impounded waters will otherwise reach a downstream point will be delayed. This is so whether the dam be located on an admittedly interstate waterway or or an intrastate pond, stream or river since, with respect to the latter, all such bodies of water flow ultimately into or connect with navigable waters of the United States.

Even if we assume that the first 4800 feet of the Clyde are properly found to be "navigable waters of the United States," the Decision of the Court below upholding jurisdiction under Section 23(b) is in direct conflict with the statute, the Congressional exposition of its purpose, prior decisions of this Court and other Courts and with all other decisions on this subject made by Respondent itself. It is a startling departure from hitherto unambiguous standards of jurisdiction under Section 23(b).

Section 23(b) requires the finding to be made that the interests of interstate or foreign commerce "would be affected." Since every dam has to have *some* "effect" on downstream conditions, it is plain that the statute does not embrace all dams. Section 23(b), and in particular the last proviso thereof, plainly contemplates that some projects

may not have the requisite "effect" to create Federal jurisdiction. The Congressional debates confirm this fact (59 Cong. Rec. p. 7730; 66th Congress, 2nd Session). The coverage was intended to extend to projects in non-navigable waters of the United States only to the extent of preventing those projects from destroying or impairing the navigable capacity of otherwise navigable waters of the United States. See: *United States* v. *Appalachian Electric Power Co.*, 107 F. 2d 769, (C. A. 4 1939), rev. o.g. 311 U. S. 377.

This Court in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690 (1899) clearly defined the Constitutional limitation of Congress' power in this regard. This Court stated, at p. 709:

> "It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. Unquestionably, the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume

> of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation."

This is exactly apposite here. Any appropriation by the State of New York, as supposed by this Court in the *Rio Grande* case, would diminish to that extent the water reaching the Hudson. Certainly, it would delay the time of its reaching the Hudson, if indeed it ever reached that River. Yet this Court held that the scope of the Commerce Clause did not *automatically* reach that situation; that jurisdiction rested upon a showing that the appropriation of water would "substantially diminish" navigability downstream. 174 U. S. 690, at 710.

The rule has always been well understood and consistently applied. In *Georgia Power Co. v. Federal Power Commission*, 152 F. 2d 908 (C. A. 5 1946), cited below, the finding of jurisdiction under Section 23(b) was predicated upon an "adverse effect" upon the navigable capacity of the river at navigable points downstream from the project in question. The effect was such as would at times "render impossible any navigation" or at other times "seriously interfere with navigation."

Four cases decided by Respondent itself on this very subject have uniformly recognized that the "effect" required by Section 23(b) is one which must be of a certain quality in order to create jurisdiction. In *Eastern New York Power Corp.*, 6 FPC, and in *Central New York Power Corp.*, 8 FPC 390, Respondent each time phrased the test in terms of an "appreciable" effect. In *Brazos River Conservation and Reclamation District*, 10 FPC 696, Respondent held that the existence of a "slight possibility of an effect" under

"exceptional circumstances" was too remote to justify jurisdiction under Section 23(b) of the Act.

In D. I. 132 (R. 1444-1454), Respondent, dealing with a section of the Connecticut River, took note of the fact that certain reaches of that stream constitued important navigable waters of the United States. Nevertheless it held that the construction and operation of a dam and reservoir many times the size of the facilities here in question "could not, by any possibility, measurably adversely affect the interests of interstate commerce * * *".

When the Court below states that "It is not necessary for us to measure how much such variation will justify actual intervention by the Commission" (Appendix B *infra*, p. 7a), it departs from the accepted standards applicable to Section 23(b), and creates a novel, and we believe erroneous, rule of law which must result, contrary to all relevant prior adjudications, in automatic Commission jurisdiction over all projects located in waters which are not navigable waters of the United States. This Decision has staggering consequences in the administration of the Federal Power Act. It completely precludes the existence of unlicensed projects in tributaries of navigable waters.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Jesse Climenko
Counsel for Petitioner

REUBEN GOLDBERG
CLIFTON G. PARKER
of Counsel

APPENDIX A

Section 3(8) of the Federal Power Act, Title 16 U. S. C. § 796(8), provides:

> "(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;"

Section 23(b) of the Federal Power Act, Title 16 U. S. C. § 817, provides:

> "It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along,

over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws."

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No 259—October Term, 1959.

(Argued April 8, 1960 Decided May 24, 1960.)

Docket No. 25705

CITIZENS UTILITIES COMPANY,
Petitioner.

—v.—

FEDERAL POWER COMMISSION,
Respondent.

Before:

LUMBARD, *Chief Judge,*
HAND and HINCKS, *Circuit Judges.*

On petition to review an order of the Federal Power Commission, determining that the Clyde River in Vermont is "navigable water of the United States" within the meaning of the Federal Power Act, and that, even though the entire river may not be navigable, the operation of the petitioner's hydroelectric dams across the river "affects interests of interstate or foreign commerce."

MILTON S. GOULD, GALLOP, CLIMENKO & GOULD, New York City, REUBEN GOLDBERG, Washington, D. C., CLIFTON G. PARKER, Morrisville, Vt., *for petitioner.*

JOHN C. MASON, Deputy Gen. Counsel, Federal Power Commission, Washington, D. C., *for respondent.* (WILLIARD W. GATCHELL, Gen. Counsel, HOWARD E. WAHRENBROCK, Solicitor, LEONARD D. EESLEY, Assistant General Counsel, DANIEL GOLDSTEIN and JOSEPH B. HOBBS, Attys., Federal Power Commission, Washington, D. C., on the brief).

Appendix B

HAND, *Circuit Judge*:

In this case the petitioner, a Delaware corporation, has built hydroelectric dams at several places on the Clyde River, Vermont, which rises in the northeast corner of the state and empties into Lake Memphremagog at Newport, Vermont. Lake Memphremagog itself extends from Newport across the border of Canada and into Canada.

After leaving a small pond, called Spectacle Pond, the Clyde passes through Island Pond, another small sheet of water, whence it meanders for six or seven miles until it is joined by a brook that carries the overflow of two other ponds, Seymour Lake and Echo Pond, at East Charleston. The Clyde continues for about five miles further, passing through Pensioner Pond and thence through Salem Pond until after three miles or so it passes through Clyde Pond and after about two miles more reaches Lake Memphremagog. The petitioner had already built dams at the outlets of Seymour Lake and Echo Pond and also across the river at West Charleston and at Clyde Pond. Another dam above the West Charleston dam had been built at Barton Village which the petitioner does not control. The occasion of this suit is the petitioner's construction of a new project including a "diversion dam," a canal, and a power plant, called Unit No. 11, across the river below the dam at the outlet of Clyde Pond.

In June 1957, the Commission began to investigate this partially completed power project in order to determine whether it was in the public interest to control it in order to preserve the navigation and water supply of the Clyde. In preliminary negotiations the parties stipulated that the petitioner should be free to oppose the jurisdiction of the Commission in spite of a "decalaration of intention" made by the petitioner. The Commission held extensive hearings before a presiding examiner who wrote a decision declaring

that the Clyde was not "navigable water of the United States" except for the first 4800 feet from its mouth, but that the petitioner's proposed Unit No. 11 and its Newport project affected the interests of interstate or foreign commerce in that part of the stream, and that the Commission therefore had jurisdiction under §817 of Title 16, United States Code, to grant or refuse a license to maintain both projects. The Commission reversed the examiner and found the whole river navigable, apparently from Spectacle Pond to its mouth, and also that not only Unit No. 11 and the Newport project affected the navigability of the river, but that the petitioner's other projects did so. The petition is to review all parts of the Commission's order.

There can be no doubt that the Clyde Pond dam and Unit No. 11 both have an effect upon the navigability of the river in its last 4800 feet. Indeed, the petitioner does not dispute that the volume of water that reaches the river below the Unit No. 11 changes when the "diversion dam" and the Clyde Pond dam are opened, as they are when hydroelectric generators at Unit 11 and at the Newport project are operated. It was proved that when the dams were opened, the height of the water below the Unit 11 rose eighteen inches and did not assume the level of the Lake until it reached Gardner Park Bridge at a distance of more than half a mile away. There was also evidence that the shutdown of Unit No. 11 made a sixteen foot-boat with four passengers and 1800 pounds of freight repeatedly scrape bottom, although when the dam was opened the boat moved without touching. Again, when the power was shut off and the dams were filling, rocks showed above the water in the stream that were covered when the power was put on again. There was a regular correlation between the two, showing changes in total water volume at times of between 12 and 282 cubic feet per second.

Appendix B

The petitioner's dams at West Charleston being about ten miles above the Clyde Pond dam, and those at Seymour Lake and Echo Pond being about twenty miles away, it is, of course, true that the effect of the "diversion dam" at Unit No. 11 and of the Clyde Pond dam upon the navigable part of the river is much more immediate than that of the dams upstream, but the water impounded by the upper dams can in the end escape only through that last mile, and the dams give the petitioner control over the time when it shall arrive. We omit the Barton Village project that does not belong to the petitioner; but Seymour Lake and Echo Pond together impound 4500 "acre feet" of water as against only 1000 "acre feet" impounded by the Clyde Pond dam. It cannot be said that the "effect" of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817, that is to say, that "interest of interstate or foreign commerce would" not "be affected by the construction of a dam" of the kind here at issue. The money question before us is as to the jurisdiction of the Commission, not how far the public interest requires the Commission to regulate their maintenance and use. It must always be remembered that in construing subchapter I of chapter XII of Title 16, United States Code, we are to take into consideration, not alone the condition of a stream as it is, but that "it is proper to consider the feasibility of future use after reasonable improvements which might be made." *United States* v. *Appalachian Power Company*, 311 U. S. 377, 409. Since there can be no doubt that the last mile of the river is "navigable" without change, the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the Commission jurisdiction over the granting of a license.

It is not necessary for us to measure how much such variation will justify actual intervention by the Commission. The "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive" (§825 l(b)), and it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of the petitioner, are capable of "affecting" temporarily the flow of water in the river below Unit 11, and, indeed, that they do so in the ordinary operation of the petitioner's business. The situation appears to us to be essentially the same as in *Federal Power Commission v. [illegible] River Power Company*, 132 Fed (2d) 908, 913 (C. A. 5).

Concluding as we do that the petitioner's dams on the Clyde River do "affect" the navigability of the last mile of that river, it becomes unnecessary for us to decide how much if any of the river above Unit No. 11 is "navigable." That question therefore we leave open.

The order of the Commission requiring an application for license is affirmed on the limited ground stated above.

Appendix B

Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 259 — October Term, 1959

CITIZENS UTILITIES COMPANY,
Petitioner,

—v.—

FEDERAL POWER COMMISSION,
Respondent.

Before:

LUMBARD, *Chief Judge,*
HAND and HINCKS, *Circuit Judges, in Chambers*

Decree

Pursuant to the opinion of this court filed on May 24, 1960, it is

ORDERED by the court that the orders issued by the Federal Power Commission on February 16, 1959 (21 FPC 233) and April 3, 1959 (21 FPC 455) which require that Citizens Utilities Company apply for a license under the Federal Power Act for operating and maintaining its hydroelectric project works on the Clyde River, including one of its tributaries, in Orleans County, Vermont, are affirmed.

Per Curiam.

Dated: June 7, 1960

J. EDWARD LUMBARD
Chief Judge

LEARNED HAND
Circuit Judge

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OCT 11 1960
JAMES R. BROWNING, Clerk

No. 407

In the Supreme Court of the United States

OCTOBER TERM, 1960

CITIZENS UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

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BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINION BELOW

The opinion and order of The Federal Power Commission (R.[1] 1738–1755) is reported at 21 F.P.C. 233. The opinion of the Court of Appeals (Pet. App. 3a–7a) is reported at 279 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1960 (Pet. App. 8a). Petitioner's timely petition for rehearing was denied on June 13, 1960. The petition for a writ of certiorari was filed on Sep-

[1] "R" refers to the folio citations in the joint appendix filed below.

tember 10, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(i).

QUESTION PRESENTED

Whether the Court of Appeals correctly held that there was substantial evidence in the record to support the Commission's findings that the first mile of the Clyde River is navigable and that operation of petitioner's hydroelectric projects on the river and a tributary thereof would affect the interest of interstate or foreign commerce.

STATUTE INVOLVED

The applicable provisions of the Federal Power Act are set forth in petitioner's appendix at pp. 1a–2a.

STATEMENT

Petitioner commenced this proceeding in the court below on a petition under Section 313(b) of the Federal Power Act, 16 U.S.C. 825l(b), to review and set aside orders of the Federal Power Commission requiring petitioner to apply for a license for its hydroelectric project works on the Clyde River and one of its tributaries in northern Vermont. The proceedings held and facts determined may be summarized as follows:

1. *Proceedings prior to the Commission's determination.* In June 1956, petitioner commenced construction of certain project works (designated in the proceedings below as Unit No. 11) for water power development on the Clyde River, approximately one mile upstream from the point at which the Clyde flows into Lake Memphremagog near Newport, Ver-

mont. By letter dated September 11, 1956, the Commission informed petitioner that it had learned of the commencement of construction without the prior filing of a declaration of intention or an application for license pursuant to Section 23(b) of the Federal Power Act, 16 U.S.C. 817 (R. 1802). On November 30, 1956, petitioner filed the required declaration of intention to obtain a Commission determination whether its proposed construction of Unit No. 11, consisting of a diversion dam, an earth diversion canal at the south end of the dam, and a new power plant, all in addition to its other hydroelectric facilities on the Clyde River, would "affect the interests of interstate or foreign commerce." (R. 1473–1475.)

By order of June 24, 1957, the Commission instituted an investigation under Section 4(g) of the Act, 16 U.S.C. 797(g), to decide whether it was in the public interest to issue an order to conserve and utilize the water resources of the Clyde (R. 1493), thereby raising the issue, *inter alia*, whether the Clyde is a navigable water of the United States. After issuance of notice and the granting of intervention to various interested parties, hearings were held before a presiding examiner. On August 12, 1958, based on evidence adduced at these hearings, the presiding examiner issued a decision in which he found that Lake Memphremogog and the Clyde River, to a point about one mile upstream from its mouth, below Unit No. 11, were navigable and that the Clyde beyond the approximate one-mile point was not navigable (R. 1621–1623). He also found that the main-

tenance and operation of petitioner's Unit No. 11 and its Newport development about two miles from the river mouth affected the navigability of the river below Unit No. 11 and affected the interests of interstate or foreign commerce in that part of the stream (R. 1621).

2. *The Commission's findings.* Both sides filed exceptions to the presiding examiner's decision (R. 1644–1723). Upon review of the record and the briefs filed by the parties, the Commission found: (1) That the Clyde River was navigable from its mouth to a point near its source, and (2) that even if the Clyde was navigable only below Unit No. 11, as found by the examiner, all of petitioner's developments on the Clyde and a tributary thereof had "a substantial effect" on the navigability of that part of the stream and on the interests of interstate or foreign commerce (R. 1741, 1750–1751). Thus, it concluded that petitioner should be required to apply for a license for all of its project works on the Clyde and on a tributary (R. 1741, 1752).

These findings of the Commission were predicated on various subsidiary findings with regard to navigability of the entire river, including the one-mile portion below Unit No. 11, and as to the effect of petitioner's projects on this one-mile part. These findings may be briefly summarized as follows:

a. *The Clyde River.*—The Commission found that the Clyde River extended for some 28 miles through northeastern Vermont emptying into the southern end of Lake Memphremagog, a lake 30 miles long, lying both in Vermont and in Canada (R. 1742). The lake was clearly navigable, its water level being main-

tained in accordance with an agreement between the United States and Canada (R. 1742). The Commission traced the course of the Clyde, describing its flow at different points along its route, its links with several ponds and tributaries, and the various hydroelectric projects set up by petitioner along the river's course (R. 1742–1743).[2] It was noted that the river, in the one-mile section below Unit No. 11, was normally at the level of Lake Memphremagog (R. 1742).

b. *Navigability of the Clyde.*—i. *Boating:* The Commission found that the entire river was suitable for navigation by small boats, which used, with particular ease, that portion of the river below Unit No. 11 (R. 1745). These boats included row boats, canoes,

[2] The average discharge of the Clyde River at Newport, Vermont, is 248 cfs., with a flow in excess of 400 cfs. about 16.5% of the time (during the months of March through June) (R. 1074). The average flow of the East Fork of the Chippewa, the navigability of which was upheld in *State of Wisconsin* v. *Federal Power Commission*, 214 F. 2d 334 (C.A. 7), certiorari denied, 348 U.S. 883, was about 240 cfs., and its flow exceeded 400 cfs. about 15% of the time. (See the Commission's brief in *State of Wisconsin, supra*, C.A. 7, No. 10948, April 1954, p. 4; compare, petition for writ of certiorari in *State of Wisconsin* v. *Federal Power Commission*, No. 373, October Term, 1954, p. 5).

The Clyde, which falls a total of 493 feet in 28 miles (R. 1372), is less precipitous than the Pigeon River, held to be a navigable water of the United States in *Pigeon River Improvement Co.* v. *Cox Co.*, 291 U.S. 138. The Pigeon River drops over 680 feet in the 20 miles nearest its mouth (House Document No. 92, 73d Cong., 1st Sess., p. 2).

[3] The Commission also found that the waters of the Clyde were inhabited by many varieties of fish and that Atlantic salmon used the river for spawning (R. 1742). The Commission found extensive damage to these fish by reason of petitioner's operation (R. 1750–1751) and its order required a minimum discharge to prevent recurrence of such damage (R. 1788).

and power boats up to 16 feet long (R. 1745, 1750). The boats had been utilized for pleasure or sport including fishing, hunting, and trapping (R. 1745).

ii. *Logging:* The Commission found that the record demonstrated a significant use of the Clyde for logging (R. 1745). The river had been the scene of frequent log drives, at least up to the year 1918 (R. 1746), and saw and pulp mills had been located along the river's banks (R. 1745–1746). The lower part of the Clyde had also been used for lumbering operations as, for example, when the farmers on the shores of Lake Memphremagog took their logs up the Clyde to the saw mills and returned with the sawed lumber (R. 1746). It was further found that transportation of pulp and logs on the Clyde to other States or to Canada through Lake Memphremagog had probably occurred (R. 1746, 1748). The Commission concluded that, even without improvement, the Clyde was suitable for such transportation (R. 1748).

iii. *Historical Usage:* The Commission took note of various maps and other historical documents introduced into evidence in finding that the Clyde had been used as a travel route in Colonial times between Canada and the English settlements in New England (R. 1746). The river had been suitable for use both by Indians and by Colonial fur traders and trappers (R. 1747, 1748).

iv. *Improvements:* The Commission found that in 1825, in connection with a survey of the Connecticut River, the Secretary of War had a study made of the possible development of a route from Lake Mem-

phremagog through the Clyde to the Connecticut River by means of a canal and improvements to existing waterways. Based on this study, he recommended to the Congress, within the bounds of reasonable expenditure, that such improvements be made (R. 1747–1748). The project, however, was not built (R. 1748). The Commission also found with regard to potential use of the Clyde at the present time, that, even without alteration, the existing traffic could be carried on between the Clyde and Lake Memphremagog (R. 1748).

c. Effect on interests of interstate or foreign commerce.—The Commission found that, by the operation of petitioner's various hydroelectric works on the Clyde and a tributary thereof, the navigable capacity of the river below Unit No. 11 was substantially affected (R. 1748–1749). Noting various examples of petitioner's ability to control the flow of the river for substantial periods of time, even to the extent of preventing all water from passing down the river for 48 hours, the Commission concluded that petitioner's operations had "a pronounced effect on stream flow" (R. 1749). With regard to that part of the river below Unit No. 11, the Commission expressly found that the operation of petitioner's projects upstream had "a substantial effect on the movement of boats" in that one-mile section of the stream, pointing, by way of example, to the effect on a 16-foot power boat which had been in that area (R. 1750). The Commission concluded that petitioner's operations would affect the interests of interstate or foreign commerce (R. 1751), and it required petitioner to file an application for license (R. 1752).

3. *The opinion below.* In its opinion, the court below (per Hand, J.), noting that, under 16 U.S.C. 825l(b), it was bound by the Commission's findings of fact if supported by substantial evidence, held that that part of the Clyde below Unit No. 11 was navigable and that petitioner's projects on the Clyde and a tributary thereof would substantially affect the navigability of this part of the stream and would thus affect the interests of interstate or foreign commerce. In so ruling, the court considered it unnecessary to reach the question of the navigability of the entire stream. But with regard to the question of navigability of the lower part of the stream under 16 U.S.C. 796(8) (Pet. App. 1a), upon review of the findings and underlying evidence, the court flatly concluded that there could be no doubt that this portion of the river was "navigable without change" (Pet. App. 6a). As to the effect of petitioner's projects on the navigability of the stream near the river mouth under 16 U.S.C. 817 (Pet. App. 1a–2a), the court, carefully noting the various examples of the effect created by petitioner's operations, held that petitioner's control of flow was not "so inconsiderable as to be beyond the scope of § 817" (Pet. 6a). Again, observing that the question was whether petitioner's projects affected navigability "enough" to give the Commission jurisdiction, the court answered this question in the affirmative (Pet. 6a–7a). Accordingly, it affirmed the order of the Commission requiring petitioner to file an application for license for all of its projects on the Clyde and a tributary thereof.

ARGUMENT

Petitioner's first argument is that, in determining the question of navigability of the lower part of the Clyde, the Commission and the court below misapplied certain criteria of navigability so as to create a conflict with other decisions. However, this argument is clearly devoid of merit. The indicia of navigability applied below have been similarly applied by this Court and other courts in numerous instances; petitioner's argument, in actuality, comes down to an assertion of lack of substantial evidence to support the findings, a question determined correctly below and plainly not presenting any necessity for review here. Petitioner's second argument, that the court below failed to find that petitioner's operations substantially affected the navigability of the lower part of the stream, is refuted by the opinion of the court making clear that this is exactly what it held. Consequently, there is no occasion for further review by this Court.

1. As petitioner properly points out (Pet. 7–8), the guiding standard for determining navigability of the whole or part of a stream is provided by Section 3(8) of the Federal Power Act, 16 U.S.C. 796(8) (Pet. App. 1a). That Section defines navigable waters of the United States, for purposes material here, as:

> * * * those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved

> condition * * * *are used or suitable for use* for the transportation of persons or property in interstate or foreign commerce, including therein * * * such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority. [Emphasis added.]

Petitioner also recognizes that the court below, in affirming the Commission's findings on navigability of the lower part of the stream as supported by substantial evidence, implicitly approved those findings (Pet. 9, 14) and the four criteria on which they were based (Pet. 10). Its argument is that these criteria of navigability were misapplied below, and that there was no substantial evidence to support certain of the findings. We think it plain that both these contentions are insubstantial.[4]

The Commission relied on four general categories of evidence to support its conclusion that the lower part of the Clyde was navigable: evidence indicating (1) boating activity, (2) historical use of the river,

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[4] Petitioner initially asserts that all the evidence before the Commission on navigability, or on what it calls the "commerce issue" (Pet. 9), applied to the navigability of the entire stream and not to any one part (Pet. 9). This is incorrect, as both the findings and record demonstrate. They deal expressly with different parts of the stream, and thus the court was able, as it did, to affirm as to the navigability of the lower part of the stream without dealing with this issue with regard to the river above Unit No. 11. Moreover, some of the evidence concerning commerce on the entire stream or improvement of the entire stream obviously supported findings limited to the first mile or any other part of the Clyde.

(3) logging activity, and (4) recommended improvement of the stream. See the Statement, *supra*, pp. 5–7. Obviously these four categories are not the sole bases for determining navigability since "[e]ach determination as to navigability must stand on its own facts" (*United States* v. *Utah*, 283 U.S. 64, 87), but these types of factor are properly to be taken into account. As this Court observed in *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, at 404–406:

> The legal concept of navigability * * * is not to be determined by a formula which fits every type of stream under all circumstances and at all times.
>
> * * * * * *
>
> It is obvious that the uses to which the streams may be put vary from the carriage of ocean liners to the floating out of logs; that the density of traffic varies equally widely from the busy harbors of the seacoast to the sparsely settled regions of the Western mountains. The tests as to navigability must take these variations into consideration.

Petitioner insists that even assuming there was evidence as to boating—which was certainly established in the record and findings, particularly with regard to the lower part of the Clyde—intrastate pleasure boating could not be utilized as a test of navigability (Pet 10). This contention ignores the statutory terms, *supra*, pp. 9–10, providing not only actual use but *suitability for use* as tests of navigability. The Commission concluded, in view of the extensive evidence of boating in the mile above Lake

Memphremagog, that there was no reason why such boating could not be carried on between the shores of Canada and this country (R. 1748); similarly, there was no reason why the established suitability for boating was restricted to small pleasure craft. As this Court has frequently reiterated, in terms applying to all four categories of evidence here, if there is any doubt of actual use, evidence of *suitability* for a particular use is sufficient under the Act to make a stream or a part thereof a navigable water. *E.g., The Montello,* 20 Wall 430, 441–443; *United States* v. *Utah,* 283 U.S. 64, 82–83; *Economy Light & Power Co.* v. *United States,* 256 U.S. 113, 122–123; *United States* v. *Appalachian Electric Power Co.,* 311 U.S. 377, 416.[5]

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[5] See particularly *Appalachian Electric Power Co.* (311 U.S. at 416):

"* * * Nor is lack of commercial traffic a bar to a conclusion of navigability where personal or private use by boats demonstrates the availability of the stream for the simpler types of commercial navigation."

The language of the Court in the earlier case of *Leovy* v. *United States,* 177 U.S. 621, 633–634, repeatedly quoted by petitioner to create the notion that there is an absolute requirement that the commerce involved must be large and important and of "substantial and permanent character", must be read in the light of the facts of that case; which are far from equalling those of the instant case. Leovy involved Red Pass of the Mississippi River over which no commerce had been conducted. Cf. *United States* v. *Wishkah Boom Co.,* 136 Fed. 42, 48 (C.A. 9), appeal dismissed for want of jurisdiction, 202 U.S. 613. It is noteworthy that in the *Appalachian* case the Supreme Court reversed the court below which had cited *Leovy* as authority (107 F. 2d 769, 781 (C.A. 4)). Cf *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 123 F. 2d 155, 158 (C.A.D.C.), certiorari denied, 315 U.S. 806.

Petitioner's challenge to the evidence showing historical use (Pet. 11)—as indicating only the possibility of Indian voyages down the Clyde—is equally groundless. The evidence, consisting both of maps and historical documents, afforded a firm basis for the finding that the river had been suitable for general Colonial travel; and a finding of Colonial use, through maps and documents similar to those introduced here, has always been considered an indication of navigability. *E.g., The Montello, supra; United States* v. *Appalachian Electric Power Co., supra; United States* v. *Utah, supra; Montana Power Co.* v. *Federal Power Commission*, 185 F. 2d 491 (C.A.D.C.), certiorari denied, 340 U.S. 947; *Georgia Power Co.* v. *Federal Power Commission*, 152 F. 2d 908 (C.A. 5).

Petitioner's objections with regard to the findings on logging activity (Pet. 12–13) and recommended improvement of the Clyde (Pet. 13–14) are similarly lacking in merit. The assertion that there was no finding of interstate log transportation on the Clyde fails to take note of the finding, adequately supported by the record, that in the continuous logging activity along the Clyde (in the past), transportation to Canada through Lake Memphremagog probably occurred[6] (R. 1746, 1748). More important, of course, is the fact that, even if there was a finding establishing the lack of actual interstate log transportation, it would be of no account as long as the Commission

[6] This finding was supported by the subsidiary finding that farmers from the shores of the Lake took their logs up the Clyde to saw mills in Vermont and returned with the cut lumber (R. 1746).

finds, as it has here (R. 1748), that the Clyde, in its link with Lake Memphremagog, is suitable for such transportation.

As for improvement of the river, all that is required under Section 3(8) of the Act as an indication of navigability is a recommendation to Congress, whether approved or not, that such improvement take place. That is what happened here in 1825 when the Secretary of War, on the basis of a study of a water route from Canada to the Connecticut River, recommended that the Clyde be improved (R. 1747–1748). Petitioner's only objection to this evidentiary factor is that the recommended improvement of the Clyde involved a "man-made, artificial canal" above the first mile (Pet. 14). This Court answered this objection when it ruled in *United States* v. *Cress*, 243 U.S. 316, 326, that certain rivers "remained navigable waters of the United States * * * notwithstanding the artificial character of the improvements" made which rendered the rivers there, in effect, "artificial canals instead of natural waterways". See also *The Robert W. Parsons*, 191 U.S. 17, 26–27.

In sum, the criteria and evidence considered by the Commission were properly used and appraised by both the Commission and the court below. At most, petitioner differs with the Commission as to the weight to be accorded the particular evidence in this record, not on any unsettled general issue of law.

2. Petitioner completely misconstrues the holding below when it asserts that the court failed to find that its hydroelectric operations in the parts of the

Clyde and a tributary thereof which may be non-navigable had a substantial effect on the navigability of the first mile of the stream, and that the court was therefore ruling that *any* effect on navigability by hydroelectric units located on the upper parts of a stream is sufficient to require licensing under 16 U.S.C. 817 (Pet. 15–18).

It should be noted, initially, that the court was reviewing, and by its action affirming, findings of the Commission that petitioner's operations had a "pronounced effect on stream flow" (R. 1749) and "a substantial effect" on the movement of boats (R. 1750) in the lower part of the river. Moreover, the court explained in some detail certain of the evidence showing the significant effect on the navigability of the lower part of the river as a result of the normal operation of petitioner's hydroelectric works (Pet. App. 5a–6a). To put the matter beyond cavil, the court expressly held that the effect was not "so inconsiderable as to be beyond the scope of §817" (Pet. App. 6a) and that petitioner's operations affected the flow of this navigable portion of the Clyde "enough to give the Commission jurisdiction over the granting of a license" (Pet. App. 6a). Finally, the court analogized the situation here with regard to the question of effect to that in *Georgia Power Company* v *Federal Power Commission*, 152 F. 2d 908 (C.A. 5).

The court's statement that it did not have to determine *exactly* how much variation in navigability caused by petitioner's operations is necessary to justify intervention by the Commission (Pet. App. 7a) in no way contradicts the finding of a *substantial* effect on navigation.

where the Fifth Circuit unequivocally found substantial effect on navigability as a result of the hydroelectric operations there involved.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

OCTOBER TERM 1960

No. 407

CITIZENS UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION,
Respondent

PETITIONER'S REPLY BRIEF

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FEDERAL POWER COMMISSION, *Respondent*.		

PETITIONER'S REPLY BRIEF

The Petition urges two basic points of the Decision below which require review by this Court. First, the Decision permits Federal Power Commission jurisdiction to attach to hydro-electric facilities, on the "effect" theory of Section 23(b) of the Federal Power Act, without any foundational finding that the waters in which the "effect" is assertedly found are used or suitable for use for the transportation of persons or property in interstate or foreign commerce. This, we urged, was in direct conflict with all pertinent prior decisions of this Court and the Courts of Appeal. (Petition, pp. 7-14).

Second, the Decision below holds that all dams located on non-navigable waters of the United States, or on non-navigable tributaries of such waters, are automatically within Federal Power Commission jurisdiction regardless of the kind or *quantum* of "effect" such facilities have on the interests of interstate or foreign commerce in down-stream navigable waters. (Petition, pp. 15-18).

There are several matters in Respondent's Brief which we believe fortify the showing of necessity for review of these issues.

1. Respondent does not point to a single word in the Decision below which is suggested to be a finding by the Court of Appeals on the "commerce" issue. Instead, Re-

spondent appears to concede a) that the Decision below made no explicit finding on this issue (Resp. Br. p. 10) and b) that the predicate for any such finding can be found only in Respondent's own Decision. Respondent then argues that Petitioner seeks to review the evidence assertedly underlying Respondent's findings on the "commerce" issue.

We respectfully suggest that Respondent's analysis of Petitioner's argument is in error. Petitioner seeks no weighing of the evidence. To the contrary, Petitioner's position is that even if we concede the correctness of the fact findings most favorable to Respondent, a holding that these facts sanction a finding of "commerce" is insupportable as a matter of law.

One example will illustrate the point. We urged (Petition, pp. 12-13) that Respondent's findings of fact on the subject of log and pulp wood transportation on the stream could not properly sustain a finding of use or suitability for use of the stream in commerce. We pointed out that it was uncontested that the water transportation of logs shown in this case never once involved transportation in interstate or foreign commerce. Yet such a requirement is the fixed minimum denominator of all the cases which allow the pertinence of log transportation as a foundation for a showing of "commerce".

The Court below, by implicitly approving Respondent's reliance on what has admittedly been only *intrastate* flotation of logs, brings itself into conflict with all prior adjudications on this subject. (Petition, p. 12).

Respondent's Brief simply does not respond to this point. Yet, this plain conflict presents a substantial issue for review by this Court.

2. A fair reading of Respondent's Brief leads to the conclusion that Respondent does not really contend here that its finding of "commerce" rests on any of the traditional criteria. Throughout, Respondent makes the insistent argument that while the Record and findings may not show "actual use" of the stream in any of the ways traditionally recognized to sustain a "commerce" finding, the "suitability"

for possible future use of the stream for these purposes will suffice. Thus, Respondent urges, without benefit of citation (and in the face of the cases which have always required an actual history of such use), that speculation about suitability for future interstate transportation of logs is adequate. (Resp. Br. pp. 13-14). But all prior cases on this issue have required a showing of substantial, continuous, past use of the stream in order to justify a conclusion that a stream is suitable for use in commerce. (Petition, pp. 12-13).

Again, although no boats of any kind have ever used the stream for interstate transportation of persons or property, there is no reason, Respondent argues, why that may not occur in the future. (Resp. Br. pp. 11-12). But if that be correct, then the bedrock of Respondent's argument is indistinguishable from the arguments which were advanced and rejected in *Leovy* v. *United States*, 177 U. S. 621 (1900). (Petition, p. 8)[1]

3. The impossibility of fitting this case into the framework of existing holdings is also confirmed by the extreme arguments to which Respondent has been forced to resort. For example, Respondent argues that the existence of a 125-year old survey of a route between Lake Memphremagog and the Connecticut River is sufficient, by itself, to support the finding of navigability below (Resp. Br., p. 14).

Respondent relies for this claim on that portion of Section 3(8) of the Federal Power Act which, after defining navigable waters to be "those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce * * * and * * * are used or suitable for use for the transportation of persons or property in interstate or foreign commerce * * *," adds:

[1]We are not unmindful of Respondent's criticism of *Leovy* (Resp. Br., p. 12). However, the inference which Respondent seeks to draw from the citation of *Leovy* in the Court of Appeals' decision in *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377, is erroneous. *Leovy* was cited and approved ten years after *Appalachian* in a case which was denied certiorari in this Court (*Iowa-Wisconsin Bridge Co.* v. *United States*, 84 F. Supp. 852 (Ct. Cl. 1949) cert. den. 339 U. S. 982 (1950).

> "* * * *together with such other parts of streams* as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; * * *" (emphasis supplied)

We submit that the clear wording of the statute shows the inappositeness of the argument to the facts of this case.

Section 3(8) makes it clear that Federal jurisdiction attaches to those parts of streams which are "used or suitable for use for the transportation of persons or property in interstate or foreign commerce." If a *part* of a stream is navigable by this definition, then the last quoted provisos of section 3(8) allow an addition to this jurisdiction of "such *other parts*" of streams as have been a) authorized for improvement by Congress or b) recommended to Congress for improvement. The important words are: "together with such other parts of streams." The statute in this respect is analogous to a case of what might be called dependent jurisdiction. If a part of a stream is navigable by the main definition, additional non-navigable parts may, under the specified conditions, be included in the ambit of Federal jurisdiction.

In short, navigability cannot attach to any part of a steam under the "recommendation-for-improvement" proviso unless some other portion of the stream is already within the Federal jurisdiction.

Since the Court below sustained the "navigability" of only the first mile of the stream, Respondent's novel argument cannot avail to support a finding of navigability of that very same reach of the stream.

Furthermore, Respondent's astonishing reliance on this argument is misplaced for the additional reason that Congress never authorized investigation of the Clyde, as a stream, for improvement. In the Court below Respondent cited a statute which purportedly evidenced this authorization.[2] It has not done so here for the simple reason that

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[2] Act of April 30, 1824, C. 46, 4 Stat. 22, 23.

the statute plainly showed that its subject matter was "roads and canals", in obvious distinction to statutes dealing with traditional investigation for improvement of "streams" or other waterways.[3]

Respondent's reliance on the canal survey to prove use or suitability for use of the Clyde River as a link in an interstate or foreign highway of commerce, in conjunction with the Nulhegan and Connecticut Rivers, is ironic when reference is had to the jurisdictional status of that part of the Connecticut River which lies north of North Stratford, the place where the Nulhegan flows into the Connecticut (R.1200). In D. I. 132, (R.144-54), which involved a project impounding water at Pittsburg on the Connecticut River, some twenty miles *north* of North Stratford, the Federal Power Commission rejected jurisdiction despite the fact that the Connecticut River was at that point much larger than the Clyde and had a proved history of logging and commercial use. Respondent's position here would, if successful, distill to the proposition that the Nulhegan, a tributary of the Connecticut, was navigable, while the Connecticut, the main stream, was not navigable at the point of confluence.

Finally, Respondent's reference to and reliance upon *United States v. Cress*, 243 U. S. 316, to substantiate its argument that the construction of an artificial canal evidences in some way the navigability of a stream, is inapposite, if not indeed misleading. The language quoted by Respondent from *Cress* (Resp. Br. p. 14) omits the crucial portion of the Court's holding which showed specifically that the waterways under consideration were concededly navigable, and within Federal jurisdiction, *before* the artificial improvements described.

4. Respondent's reliance on *Pigeon River Improvement Co. v. Cox Co.* 291 U. S. 138 is misplaced. Reference to the rate of fall in the *Pigeon River* case is inapposite because there the finding of jurisdiction rested upon the

[3]See, for example: Act of May 20, 1826, C. 78, 4 Stat. 175. Act of May 24, 1824, C. 139, 4 Stat. 32

incontestable fact that the Pigeon River was an *international boundary stream* over which Federal jurisdiction would exist, entirely aside from every other consideration.

5. We pointed out that the Decision below sustained jurisdiction by reason of its conclusion that *any* effect was sufficient under Section 23(b) of the Federal Power Act (Petition, pp. 15-18). Respondent attempts, on the other hand, to convince this Court that the Decision below actually made a finding that the operation of Petitioner's upstream facilities had a "substantial effect" on the interests of interstate or foreign commerce (Resp. Br. pp. 14-16). We submit that the Decision below, and particularly the quotations therefrom at page 7 of the Petition, demonstrate the contrary.

Critical in this connection is the conceded fact that the one mile reach of the stream which the Court below holds to be navigable, and in which Respondent argues the statutory "effect" is found, is at lake level (Resp. Br. p. 5); that even if the entire Clyde River were eliminated as a source of water for that reach of the stream, the minimum level of that reach would be wholly unchanged. Unlike the fact situation in *Georgia Power Co. v. Federal Power Commission*, 152 F. 2d 908 (C. A. 5 1946), where the downstream reaches which were held to suffer the "substantial effect" depended for their water supply on the flow past those upstream places where the utility's facilities were located, the first mile of the Clyde does not depend for its water supply on upstream sections. Therefore, even if, as Respondent argues (Resp. Br., p. 7), Petitioner could withhold all flow for forty-eight hours, such control will not reduce the minimum level of the first mile of the stream below lake level since that level is controlled by the dam at the Canadian end of the lake.

Finally, the most significant indication that the Court below did not in fact find that there was a "substantial effect" upon the interests of interstate or foreign commerce, lies in the circumstance that the Court below never even mentioned the "principal" effect which Respondent's

Decision purported to find—damage to fish below the Newport powerhouse (R. 1751).

We respectfully submit that the refusal of the Court below to measure, indeed that Court's inability to find, the "substantial effect" required by the statute and the cases, is entirely understandable in the light of Respondent's reliance upon injury to fish as a cornerstone of jurisdiction. That Respondent could compare this kind of "effect" with the "effects" found by the Court, for example, in *Georgia Power Co.*, is a compelling indication of the complete departure of the Decision below from accepted and well defined standards of jurisdiction under Section 23(b) of the Federal Power Act.

Injury to fish has never been held or even suggested to be that kind of an effect which could create jurisdiction under Section 23(b) of the Federal Power Act.

Furthermore, it is uncontested on this record that the evidence relating to injury to fish was entirely limited to reaches *upstream* from the one-mile lake level portion of the river which the Court below held to be "navigable" (R. 1751). Therefore, contrary to all prior adjudications, Respondent relied for its finding of jurisdiction upon an "effect" which was not even located in the portion of the stream otherwise held to be navigable waters of the United States.

CONCLUSION

Respondent's Brief does not deny that the Clyde River is the smallest, most insignificant stream which Respondent has ever attempted to bring within its jurisdiction. Respondent does not deny that, as the Chief Presiding Examiner held, no proceeding has been cited in which the volume of commerce was so small as that shown here.

We respectfully urge that if the Decision of the Court below be permitted to remain, if its holdings be not reviewed by this Court in accordance with the questions which we have presented in the Petition, there is no dam on any stream which is not within the jurisdiction of the Respondent.

We respectfully submit that for the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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